

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs June 18, 2008

WILLIE BOB KING v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Warren County
No. F-9178 Larry B. Stanley, Jr., Judge

No. M2007-01415-CCA-R3-PC - Filed August 5, 2008

The petitioner, Willie Bob King, appeals the Warren County Circuit Court's denial of his petition for post-conviction relief from his convictions for two counts of aggravated burglary, two counts of aggravated assault, and one count of resisting arrest and resulting effective thirty-year sentence. On appeal, the petitioner contends that he received the ineffective assistance of counsel and that his sentences are excessive and disproportionate to similar cases in other jurisdictions. Based upon the record and the parties' briefs, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Bud Sharp, McMinnville, Tennessee, for the appellant, Willie Bob King.

Robert E. Cooper, Jr., Attorney General and Reporter; David H. Findley, Assistant Attorney General; Lisa Zavogiannis, District Attorney General; and Thomas Miner, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

We glean the following facts from this court's opinion in the petitioner's direct appeal: In the early morning hours of July 25, 2002, the petitioner dove through a glass window into his wife's apartment and physically assaulted her. State v. Willie Bob King, No. M2004-00548-CCA-R3-CD, 2005 Tenn. Crim. App. LEXIS 522, at *3 (Nashville, May 25, 2005), perm. to appeal denied, (Tenn. 2005). The victim's fifteen-year-old neighbor, "Mr. Knowles," heard her screaming, kicked in her apartment door, and saw the petitioner hitting her. Id. at *4. The petitioner confronted Knowles, scuffled with him, and cut Knowles with a butterfly knife. Id. at *5. Meanwhile, Knowles' mother had entered the victim's apartment and had taken the injured victim back to her apartment for safety.

Id. Knowles' mother testified that she helped the victim to her apartment and locked the door but that the petitioner broke into the apartment, found the victim, and began hitting the victim. Id. at *6. The victim testified that after the petitioner broke into her apartment and assaulted her, she hid in her neighbor's apartment and that the petitioner did not find her there. Id. at *4. McMinnville City Police Officer Robert Hutchins testified that when the police arrived at the apartment complex, the petitioner ran from them. Id. at *7. Officer Hutchins tackled the petitioner, who smelled of alcohol, and the petitioner fought with officers until they handcuffed him. Id. Officer Hutchins recovered a butterfly knife dropped by the petitioner and observed physical injuries to the victim. Id. at **7-8. On direct appeal, the petitioner argued, in pertinent part, that the evidence was insufficient to support his convictions, that his sentences were excessive, and that the trial court improperly ordered consecutive sentencing. Id. at **1-2. This court affirmed the petitioner's convictions and sentences. Id. at *37.

Subsequently, the petitioner filed a petition for post-conviction relief. The post-conviction court appointed counsel, and counsel filed an amended petition in which the petitioner claimed that he received the ineffective assistance of counsel and that the trial court imposed excessive sentences because it refused to consider enhancement and mitigating factors fairly.

At the evidentiary hearing, the petitioner testified that he was living with his wife in their apartment when the alleged crimes occurred. He tried to tell his attorney that he was living in the apartment and, therefore, did not commit aggravated burglary, "but it seemed like nobody didn't want to listen." The petitioner explained that before the alleged crimes, he left the apartment to buy beer, returned with a case of Budweiser, and drank beer with the victim. He gave his "old lady" twenty dollars but thought she was going to use the money to buy marijuana, so he tried to take the money out of her pocket. The victim "started hollering like she was getting all beat up and tore up." The petitioner stated that Knowles kicked in the apartment window, kicked in the door, and came inside. The petitioner "ducked," and Knowles "knocked the heck out of [the petitioner's] old lady." The victim fell down, and the petitioner hit Knowles in the chest with a knife. The petitioner stated that the victim went to the apartment next door and that the petitioner went there also. The apartment door was open, but someone told the petitioner, "[D]on't you come in no further." The petitioner said he went outside, did not take anything from the neighbor's apartment, and did not fight anyone else. When the police arrived at the scene, the petitioner "just moved a little bit" and did not try to run from them. The petitioner acknowledged that he was guilty of aggravated assault of Knowles.

The petitioner testified that he did not receive a mental evaluation and that he did not tell trial counsel he had been drinking alcohol on the night of the crimes. He acknowledged that the State offered him a nine-year sentence in return for his guilty pleas but said that he refused to take the offer because he was not guilty. He stated that he had three or four prior felony convictions, including a conviction for armed robbery.

On cross-examination, the petitioner testified that he had wanted to "tell my part" at trial but that he did not testify. He acknowledged that he thought the trial judge asked him if he wanted to

testify and that he told the judge “no or something like that.” He acknowledged that at the time of the alleged crimes, the victim had an order of protection against him. Regarding the State’s witnesses at trial, the petitioner stated that trial counsel “should have pushed them a little bit more and made them tell the truth.” He acknowledged that trial counsel advised him to take the State’s nine-year plea offer.

The petitioner’s trial attorney testified that he always talked with defendants about their potential punishments if convicted. Although counsel did not specifically remember doing so with the petitioner, he said he handled every case the same way. Counsel spoke with the victim before trial. Counsel then talked with the petitioner about the victim’s potential testimony. Counsel did not remember the petitioner’s telling him that the petitioner had been living in the apartment or had a key to the apartment. He acknowledged that he believed the petitioner may have been intoxicated at the time of the crimes but that he did not use a voluntary intoxication defense. Counsel stated that he thought he cross-examined the State’s witnesses sufficiently about inconsistencies in their testimony. He stated that the petitioner appeared to be competent and that he did not request a mental evaluation for the petitioner. Counsel was surprised the petitioner received an effective thirty-year sentence.

The post-conviction court denied the petition for post-conviction relief. It noted that the only defense available in this case was that the events did not take place as the victim had described. The court also noted that nothing in the record indicated counsel should have raised a voluntary intoxication defense, especially when the petitioner did not testify at trial “to show to some extent that he was intoxicated to such a degree that he could not appreciate the nature of what he was doing.” The court held that the petitioner failed to show that counsel did not properly investigate his case and that nothing indicated defense counsel did not develop an adequate theory of defense. Regarding the petitioner’s excessive sentences, the court ruled that the issue had been properly addressed in the petitioner’s direct appeal.

II. Analysis

The petitioner contends that he received the ineffective assistance of counsel because he told his trial attorney that he had been living with the victim, had a key to her apartment, and did not assault anyone in the second apartment. Therefore, he was not guilty of the aggravated burglaries. However, counsel did not investigate the petitioner’s claims to find out if they were true. Regarding his sentences, the petitioner contends they are excessive. He also argues for the first time in this appeal that they are disproportionate to similar cases in other jurisdictions. The State contends that the post-conviction court properly denied post-conviction relief. We agree with the State.

To be successful in a claim for post-conviction relief, the petitioner must prove all factual allegations contained in the post-conviction petition by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f). “Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” State v. Holder, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999) (quoting Hodges v. S.C. Toof & Co.,

833 S.W.2d 896, 901 n.2 (Tenn. 1992)). Issues regarding the credibility of witnesses, the weight and value to be accorded their testimony, and the factual questions raised by the evidence adduced at trial are to be resolved by the post-conviction court as the trier of fact. See Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997). Therefore, we afford the post-conviction court's findings of fact the weight of a jury verdict, with such findings being conclusive on appeal absent a showing that the evidence in the record preponderates against those findings. Id. at 578.

A claim of ineffective assistance of counsel is a mixed question of law and fact. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). We will review the post-conviction court's findings of fact de novo with a presumption that those findings are correct. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). However, we will review the post-conviction court's conclusions of law purely de novo. Id.

"To establish ineffective assistance of counsel, the petitioner bears the burden of proving both that counsel's performance was deficient and that the deficiency prejudiced the defense." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). In evaluating whether the petitioner has met this burden, this court must determine whether counsel's performance was within the range of competence required of attorneys in criminal cases. See Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975).

Initially, we note that the petitioner has failed to include the direct appeal record with the post-conviction record on appeal and did not ask this court to take judicial notice of the direct appeal record. It is the petitioner's duty to make sure that a complete and accurate record is before this court on appeal. See Thompson v. State, 958 S.W.2d 156, 164 (Tenn. Crim. App. 1997). Nevertheless, we can conclude from the record before us that the petitioner is not entitled to relief.

Regarding the petitioner's claim that he told trial counsel he lived in the apartment and, therefore, could not be guilty of aggravated burglary, trial counsel testified that he did not remember the petitioner's telling him that the petitioner lived with the victim and had a key to her apartment. The post-conviction court obviously accredited trial counsel's testimony over that of the petitioner. In any event, the petitioner is essentially arguing that he could not have committed aggravated burglary because he was an "owner" of the apartment by living there and by having lawful possession of the property. See Tenn. Code Ann. §§ 39-14-401(3), -402(a)(1), -403(a). However, as noted in the State's brief, for purposes of the burglary statutes, an "owner" cannot include anyone "restrained from the . . . habitation by a valid court order or order of protection . . . obtained by the person maintaining residence on the property." Tenn. Code Ann. § 39-14-401(3). Therefore, in addition to being unable to show that counsel rendered deficient performance, the petitioner also has failed to show that he was prejudiced by any deficiency.

Regarding the petitioner's sentences being excessive, the issue was addressed on direct appeal and is precluded from further review. See Tenn. Code Ann. § 40-30-106(h). As to his claim that the lengths of his sentences are disproportionate to similar cases in other jurisdictions, the Post-Conviction Procedure Act provides, in general, that "[a] ground for relief is waived if the

petitioner . . . failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.” Tenn. Code Ann. § 40-30-106(g). Therefore, the issue has been waived.

III. Conclusion

Based upon the record and the parties’ briefs, we affirm the judgment of the post-conviction court.

NORMA McGEE OGLE, JUDGE